IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 56261-4-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
ERNEST ALLEN REVEY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 7, 2006
	)	

PER CURIAM. The mandatory deadly weapon sentence enhancement does not violate double jeopardy, even if use of a weapon is an element of the offense. We reject Revey's challenges to the evidence and instruction, and affirm the conviction and sentence.

FACTS

On February 4, 2005, Bellingham police responded to a 911 call regarding a stabbing. Mark Wright was the first officer to arrive. Ernest Revey approached Wright's patrol car and frantically pointed toward an empty lot where he said someone needed help. Wright found Lester Strilchuk curled in a fetal position on the ground, very pale and totally unresponsive. Strilchuck was bloody, his t-shirt was cut, and there was an approximately one inch long cut on the left side of his chest. Medics arrived

and took Strilchuk to the hospital.

Wright then asked Revey about the stabbing, and Revey gave a description of Strilchuk's attacker. Revey later agreed to participate in a show-up involving someone matching the description, but he did not make an affirmative identification.

Strilchuk had received a stab wound that penetrated into his heart. The wound required surgery to repair the cut. A few days after he left the hospital, Strilchuk told the police that Revey had stabbed him. Strilchuk said he had a very sharp filet knife in the pocket of his jacket. He and Revey were drinking beer together when Revey suddenly elbowed him and pinned him down. Revey grabbed the knife out of his pocket, pointed it at him, and stabbed him.

Officer Michael Johnston subsequently questioned Revey. Officer Johnston testified at trial that he wanted to get the direct truth from Revey. He told Revey the police had completed their investigation and that he knew that Revey had stabbed Strilchuk. Revey admitted he stabbed Strilchuk, but said the stabbing occurred when Strilchuk pulled a knife and the men struggled and fell.

Revey was charged with one count of second degree assault while armed with a deadly weapon. The jury found Revey guilty of second degree assault, and in a separate verdict found that he was armed with a deadly weapon during commission of the assault. The trial court imposed a sentence in the middle of the standard range, with a 12 month mandatory sentence enhancement for the deadly weapon finding. Revey appeals.

ANALYSIS

Double Jeopardy. Revey contends the trial court violated his right to be free from double jeopardy when it imposed a sentence enhancement based on the deadly weapon finding, when use of a deadly weapon is an element of second degree assault. "Review of a double jeopardy claim requires this court to determine whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute."[1]

Washington courts have long noted that "the Legislature has clearly expressed its intent . . . that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding the fact that being armed with a deadly weapon was an element of the offense."[2]

The State charged Revey under RCW 9.94A.533(4)(b), which requires an enhancement of "[o]ne year for any felony defined under any law as a class B felony." RCW 9A.36.021(2)(a) defines second degree assault as a class B felony. Further, RCW 9.94A.533(e) provides, "[n]otwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory." Section (f) states that "[t]he deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony." Second degree assault does not fall

[1] State v. Huested, 118 Wn. App. 92, 94, 74 P.3d 672 (2003), review denied, 151 Wn.2d 1014, 89 P.3d 712 (2004).

[2] State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542 (1987); see also State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

within the group of exempted crimes. Under the plain language of the statute, the legislature intended the enhancement to apply in a case such as Revey's.

Revey argues that under Blakely v. Washington,[3] the deadly weapon sentence enhancement adds a redundant element to the crime of second degree assault and leads to double punishment. But Blakely is concerned only with according the defendant his right to a jury trial by assuring that the trier of fact and not the judge find all the facts used in sentencing. In this case, the jury separately found that Revey was armed with a deadly weapon when he committed the second degree assault. The trial court did not err in imposing the sentence enhancement.

Opinion Testimony on Defendant's Guilt. Revey next contends the trial court erred in admitting testimony by a police officer and a physician expressing opinions as to Revey's guilt. "It is well-established that no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially."[4]

Revey did not object to Officer Johnston's testimony, and he does not show how the testimony affected his right to an independent determination of guilt by the jury or how it affected the verdict. A review of the record shows Officer Johnston did not testify he believed Revey intentionally stabbed Strilchuk, but rather related what he told Revey during questioning. And the fact that the officer told Revey that he "knew" Revey had stabbed Strilchuk is irrelevant to the issue in this case, which is whether the stabbing was intentional or accidental. In addition, Revey admitted in his testimony

[3] 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

[4] State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993).

that he stabbed Strilchuk, so Officer Johnston's testimony was not prejudicial.

During direct examination, the prosecutor asked Dr. Fox about different kinds of force and whether Strilchuk's wound appeared to have been applied by a force that was applied straight and then stopped. When the prosecutor asked whether the wound was more consistent with a measured, stabbing motion or a continued blunt force, the trial court sustained a defense objection. On cross-examination, defense counsel asked whether the wound could have been caused if Strilchuk and Revey struggled, Revey tried to turn the knife, turned it toward Strilchuk, and they both fell. This question opened the door to subsequent questioning by the prosecutor regarding the likelihood of the scenario defense counsel described.[5] Under ER 701, Dr. Fox's experience treating many wounds caused by cuts to the body established her expertise to discuss whether Strilchuk's wound appeared more or less likely to have been caused by direct force (stabbing), or blunt force (falling). We find no error requiring reversal.

Reasonable Doubt Instruction. "'It is well-settled law that before error can be claimed on the basis of a jury instruction given by the trial court, an appellant must first show that an exception was taken to that instruction in the trial court.'"[6] Where a defendant made no objection, he must show that the error is of constitutional magnitude.[7] Revey did not object to the instruction at trial, but now asserts that instruction 17 misstated the burden of proof and shifted the burden of proof to him, in

[5] See State v. Hayes, 73 Wn.2d 568, 571, 439 P.2d 978 (1968).

[6] State v. Barnett, 104 Wn. App. 191, 201, 16 P.3d 74 (2001) (quoting State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990)).

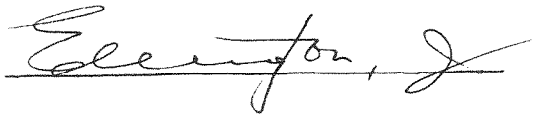
[7] State v. Scott, 110 Wn.2d 682, 685–86, 757 P.2d 492 (1988).

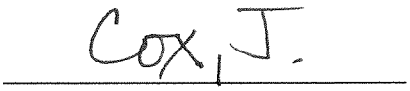
violation of his right to be found guilty beyond a reasonable doubt. But Revey fails to show any constitutional violation in the giving of this instruction.

We must consider jury instructions in the context of the instructions as a whole.[8] Instructions are sufficient if they set forth the applicable law, do not mislead the jury, and allow the defendant to argue his theory of the case.[9] Instruction 17 reminded the jury that each member had taken an oath to "well and truly try the case and a true verdict render upon the evidence given you in the trial," that the jury should not allow sympathy or prejudice to influence its verdict, and that "the defendant is, upon the evidence and the evidence alone, either guilty or not guilty."[10] Other instructions set out the duty to act impartially, consider the evidence impartially, and the definition of reasonable doubt. Revey fails to show how the burden of proof shifted, and we conclude that it did not. The instructions as a whole adequately stated the law and the jury's duty to make its decision on the basis of the facts and the law.

Affirmed.

FOR THE PANEL:





[8] State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

[9] Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000).

[10] Clerk's Papers at 54.